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Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

No. 98-1745

In the

Supreme Court of the United States

October Term, 1998

KEITH VAN HORNE,

Petitioner,

v.

EVERGREEN MEDIA CORPORATION,
a Delaware corporation, and WRCX RADIO,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEVEN L. BARON
Counsel of Record
SHEILA D. JOYCE-ROMANI
AZAM NIZAMUDDIN
D'ANCONA & PFLAUM LLC
111 East Wacker Drive
Suite 2800
Chicago, Illinois 60601-4205
(312) 602-2000

Counsel for Respondents

Wright/Curry & Taylor Appellate Services

CORPORATE DISCLOSURE STATEMENT

Evergreen Media Corporation was a Delaware corporation. In 1997, Evergreen merged with Chancellor Media Corporation and changed its name to Chancellor Media Corporation. Chancellor Media Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Evergreen Media Corporation, a Delaware corporation, and WRCX Radio, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 185 Ill. 2d 299, 705 N.E.2d 898 (1998).

The respondents incorporate the Background section of the Illinois Supreme Court's opinion as and for their Statement of the Case herein.

JURISDICTION

The Judgment of the Illinois Supreme Court was entered on December 3, 1998. Petitioner's Petition for Rehearing was denied on February 1, 1999. Jurisdiction is not proper under 28 U.S.C. § 1257 because as set forth more fully below, the Illinois Supreme Court's opinion was not a final disposition of the litigation, and even more importantly, was not decided on federal grounds. In fact, the Illinois Supreme Court refused to decide the federal question raised below, namely, whether the First Amendment allows a public figure, such as petitioner, to state a claim for negligent or reckless hiring, retention or supervision based upon an employee's defamatory conduct.

REASONS FOR DENYING THE WRIT

I. JURISDICTION IS NOT PROPER BECAUSE THE ILLINOIS SUPREME COURT'S DECISION IS NOT A FINAL DECISION DISPOSING OF ALL ISSUES IN THE CASE.

Van Horne's petition is directed to the Illinois Supreme Court's reversal of the Illinois Appellate Court's reinstatement of Counts V - VIII of his second amended complaint. Under the final judgment rule, this Court's jurisdiction to review the decision of a state court is limited to reviewing final judgments. 28 U.S.C. § 1257(a) (1993). The rule requires that a state court decision be final in two ways: first, it must not be subject to any further review

in any other state court, and second, "it must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant*, 522 U.S. 75, 118 S. Ct. 481, 486 (1997), *quoting Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S. Ct. 770, 773 (1945).

Although the Illinois Supreme Court's decision is a final judgment relating to the negligent employment claims (Counts V-VIII), the case has been remanded for trial of Van Horne's defamation claims and is not a final determination of the litigation warranting review in this Court. The case came to the Illinois Supreme Court at the pleadings stage and is merely an interlocutory appeal; it does not dispose of the litigation in its entirety. On the contrary, Counts I, III and IV of the complaint were never at issue on the appeal, and Count II has now been remanded for trial with Van Horne's other defamation claims. Moreover, after the Illinois Supreme Court issued its ruling, Van Horne filed his fourth amended complaint, in which he asserted additional defamation claims and new claims for negligent and reckless supervision and retention. The case is set for trial on March 15, 2000.

Additionally, the injury to reputation that Van Horne has pled in his defamation claims is identical to the reputation injury alleged in his negligent employment claims. Thus, if the jury finds that he has not suffered any injury to his reputation at the trial on his defamation claims, the impact of the opinion below will be moot because Van Horne will be unable to prove the injury element of his negligent employment claims. Because Van Horne's appeal is not based on a final disposition, and in the interests of judicial economy, the petition for certiorari should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(a).

II. JURISDICTION IS NOT PROPER BECAUSE THE ILLINOIS SUPREME COURT'S DECISION WAS BASED SOLELY ON ILLINOIS LAW.

Van Horne contends that the Illinois Supreme Court has given media employers a license to avoid laws of general application by heightening the pleading requirements for them in negligent

employment cases. (Pet. for Cert. at 9). He has asked this Court to decide whether the First Amendment permits special burdens of pleading and proof for media employers in negligent hiring, supervision and retention cases. In its opinion below, however, the Illinois Supreme Court expressly declined to decide the questions presented by Van Horne. Indeed, the court found that Van Horne had not, and could not, properly allege the element of proximate cause in the negligent employment counts of his complaint. The decision was squarely based on state tort law.

The Illinois Supreme Court found that, although Van Horne alleged that Evergreen and WRCX were aware that Muller had previously made outrageous, and perhaps even offensive, remarks as a broadcaster, Van Horne did not allege that Muller had ever made false or defamatory statements. The court concluded that Evergreen and WRCX therefore could not have been on notice that Muller was likely to make false, defamatory statements in his position as a broadcaster. (App.1 at 15a-16a). The court was careful to limit its holding, stating: "[w]e hold only that this cause of action may not be premised solely on allegations that an employer hired an employee who had previously engaged in controversial, but nondefamatory, speech conduct." *Id.*

To state a claim for negligent hiring, retention or supervision in Illinois, a plaintiff must allege that the employer "knew or should have known that the employee in question had a particular unfitness for the position so as to create a danger of harm to third persons." *Mueller v. Community Consol. School Dist. 54*, 287 Ill. App. 3d 337, 341-42, 678 N.E.2d 660, 663 (1st Dist. 1997), *citing Fallon v. Indian Trail School*, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101, 103-04 (2d Dist. 1986), *appeal denied*, 114 Ill. 2d 544, 508 N.E.2d 727 (1987). "Liability for negligent hiring arises only when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed th[e] applicant in employment where he could injure others." *Fallon*, 148 Ill. App. 3d at 935, 500 N.E.2d at 103-04. In reversing the Appellate Court and dismissing Counts V – VIII of the complaint, the Illinois Court merely held that Van Horne failed to allege that Muller had ever exhibited a

particular unfitness for his position as a broadcaster which exposed Van Horne to a foreseeable risk of being defamed.

Other Illinois courts have similarly dismissed negligent hiring, retention and supervision claims for failure to allege that an employee's particular unfitness created a foreseeable risk of harm to third parties. *Mueller*, 287 Ill. App. 3d at 342, 678 N.E.2d at 664-65 (upholding dismissal of negligent hiring, retention and supervision claims because complaint failed to allege that employer's negligence proximately caused plaintiff's injury); *Fallon*, 148 Ill. App. 3d at 935, 500 N.E.2d at 103-04 (upholding dismissal of complaint because complaint did not establish that employees' unfitness created particular risk of harm to plaintiff). *See also Giraldi v. Community Consol. School Dist. #62*, 279 Ill. App. 3d 679, 692, 665 N.E.2d 332, 340 (1st Dist. 1996) (upholding directed verdict for defendant where plaintiff failed to show that employee's unfitness, a tendency to run late, was a proximate cause of plaintiff's sexual assault), *appeal denied*, 168 Ill. 2d 589, 671 N.E.2d 730.

The Illinois Court's decision below was based on the principles of Illinois tort law enunciated in cases like *Fallon* and *Giraldi*. Because the court found the complaint deficient in alleging the element of proximate cause, it never reached the issue of whether, and to what extent, the First Amendment limits a negligent employment claim based on an employee's defamatory statements. The Illinois Supreme Court decided the case solely on state tort law grounds, and Van Horne's petition should therefore be dismissed for lack of jurisdiction.

III. THE ILLINOIS COURT'S OPINION DOES NOT CREATE HIGHER BURDENS FOR PLAINTIFFS WHO FILE NEGLIGENT EMPLOYMENT ACTIONS AGAINST MEDIA EMPLOYERS.

By contending that the Illinois Supreme Court has carved out a special exception in negligent employment cases for media employers, Van Horne has attempted to create a First Amendment issue where none exists. If anything, the opinion is in accord with the principle articulated by this Court in *Hustler v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988), that plaintiffs are not

constitutionally permitted to recover damages for reputational harm through the vehicle of other torts. Van Horne asserts, however, that the Illinois Supreme Court's opinion contravenes this Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S. Ct. 2513 (1991). (Pet. for Cert. at 9). In *Cohen*, this Court held that the First Amendment does not protect the media from the application and enforcement of general laws.

The *Cohen* analysis is entirely inapplicable here, however, because the Illinois Supreme Court's decision does not create any special protections for media employers. The court simply held that a cause of action for negligent hiring, retention or supervision "may not be premised solely on allegations that *an employer* hired an employee who engaged in controversial, but nondefamatory, speech or conduct." (App.1 at 16a (emphasis supplied)). Although media employers are often susceptible to liability for an employee's defamatory statements, the Illinois Supreme Court's decision does not single out media employers for special treatment. Rather, the opinion merely echoes the general principle of tort law that, in negligent employment, there must be some nexus between the employee's past conduct and the conduct giving rise to the tortious injury. Under any construction, the Illinois Supreme Court was careful to avoid the broad-brush ruling that Van Horne now ascribes to it. This Court need not address principles of First Amendment jurisprudence that are not implicated by the lower court's ruling.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BARON
Counsel of Record
SHEILA D. JOYCE-ROMANI
AZAM NIZAMUDDIN
D'ANCONA & PFLAUM LLC
111 East Wacker Drive/Suite 2800
Chicago, Illinois 60601-4205
(312) 602-2000